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No. 89-

In The

Supreme Court of the United States

October Term, 1989

UNITED TRANSPORTATION UNION,

Petitioner,

v.

UNITED TRANSPORTATION UNION, LOCAL 74,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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(C) 302

QUESTIONS PRESENTED

1. Is there a right to a jury trial of a local union's claim against its international union alleging that the international union breached its duty of fair representation – a duty which has been implied from the Railway Labor Act (45 U.S.C. 151 *et seq.*) – whenever monetary compensation in any form is sought as part of the request for relief?

2. Did the court below err by creating a new action for breach of the duty of fair representation, in holding that the "wide range of reasonableness" standard held to be applicable by this Court in such actions involving seniority adjustments does not apply, by characterizing the issue as one involving failure to consider complaints, rather than unfair resolution of competing claims?

3. Did the court below err in misapplying this Court's precedent concerning exceptions to the general requirement that internal union remedies must be exhausted prior to suit?

PARTIES BELOW

The Consolidated Rail Corporation was originally a party to the action in the district court, but was dismissed as a party prior to trial and the appeal below. The parties listed in the caption, United Transportation Union and United Transportation Union, Local 74, are the only current parties.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THERE IS A CONFLICT BETWEEN THE DECISIONS OF COURTS OF APPEALS AS TO WHETHER THERE IS ANY CONSTITUTIONAL OR STATUTORY BASIS FOR A JURY TRIAL RIGHT IN DUTY OF FAIR REPRESENTATION CASES, WHICH THIS COURT WILL RESOLVE THIS TERM IN *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, No. 88-1719 5

II. THE DECISION BELOW FAILS TO APPLY DECISIONS OF THIS COURT CONCERNING THE DUTY OF FAIR REPRESENTATION IN SENIORITY ADJUSTMENT MATTERS 6

III. THE DECISION BELOW MISAPPLIED THE LAW FROM THIS COURT CONCERNING THE REQUIREMENT TO EXHAUST INTERNAL UNION REMEDIES 8

CONCLUSION 8

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Chauffeurs, Teamsters and Helpers, Local 391 v. Terry, No. 88-1719 5

Clayton v. Int'l Union, United Auto Workers, 451 U.S. 679 (1981) 8

Deringer v. Columbia Transp. Division, 866 F.2d 859 (6th Cir. 1989) 6

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 7

Humphrey v. Moore, 375 U.S. 335 (1964) 7

Leach v. Pan American World Airways, 842 F.2d 285 (11th Cir. 1986) 6

McMullans v. Kansas, Oklahoma & Gulf Ry., 229 F.2d 50 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956) 7

Quinn v. DiGuilian, 739 F.2d 637 (D.C. Cir. 1984) 6

Ross v. Bernhard, 396 U.S. 531 (1970) 5

Terry v. Chauffeurs, Teamsters and Helpers, Local 391, 863 F.2d 334 (4th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3826 (1989) 6

Wood v. Int'l Bhd. of Teamsters, 807 F.2d 493 (6th Cir. 1986) 5

STATUTES:

Railway Labor Act, as amended, 45 U.S.C. 151 *et seq.* 4, 5

45 U.S.C. 152 Fourth 2

No. 89-

In The

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October Term, 1989

UNITED TRANSPORTATION UNION,

Petitioner,

v.

UNITED TRANSPORTATION UNION, LOCAL 74,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner United Transportation Union ("UTU") respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 881 F.2d 282 and is reproduced in the Appendix ("App.") at 1a to 21a. The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Northern District of Ohio, Western Division, after trial to

the court, dated July 29, 1988, are unreported and are set forth at 24a to 51a of the Appendix.

JURISDICTION

The original decision of the court of appeals was filed on July 31, 1989. UTU timely filed a petition for rehearing and hearing en banc on August 11, 1989. On October 16, 1989, that petition was denied. App. at 22a-23a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

A claim against a union for breach of its duty of fair representation ("DFR") is implied from Section 2 Fourth of the Railway Labor Act (45 U.S.C. 152 Fourth), which provides:

> Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny

or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

STATEMENT OF CASE

United Transportation Union, Local 74 ("Local 74") filed its Complaint in the United States District Court for the Northern District of Ohio, Western Division, on August 4, 1982 naming UTU and the Consolidated Rail

Corporation ("Conrail") as defendants.[1] Local 74 alleged a breach of the UTU's duty of fair representation in failing to obtain for its members an equitable allocation of the yard work previously handled in Marion and now claimed to be diverted to other switching facilities on Conrail upon conveyance date of the properties. The action was brought pursuant to the Railway Labor Act, 45 U.S.C. 151, *et seq.* ("RLA"), an act regulating commerce (28 U.S.C. 1337).

On January 30, 1986, the district court granted UTU's motion to strike the jury demand, and the fair representation claim was tried to the court in early February, 1986. The court issued its Findings of Fact, Conclusions of Law, and Judgment on July 29, 1988, finding no violation of the fair representation duty, and a failure of Local 74 to exhaust its internal union remedies. App. at 24a-51a.

The court of appeals reversed and remanded (Judge Wellford dissenting) holding Local 74 was entitled to a jury trial on its claim against UTU, and that UTU would not have been entitled to a directed verdict on the duty of fair representation and failure to exhaust internal union remedies issues. 881 F.2d 282; App. at 1a-21a.

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[1] As noted by the court of appeals, Local 74 voluntarily dismissed its claims against Conrail, reflected in an order of the district court dated December 20, 1985. 881 F.2d at 283 n.1, App. at 2a n.1.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT BETWEEN THE DECISIONS OF COURTS OF APPEALS AS TO WHETHER THERE IS ANY CONSTITUTIONAL OR STATUTORY BASIS FOR A JURY TRIAL RIGHT IN DUTY OF FAIR REPRESENTATION CASES, WHICH THIS COURT WILL RESOLVE THIS TERM IN *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, No. 88-1719.

This case is the RLA analogue to *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, No. 88-1719, argued before this Court December 6, 1989. In holding that the claim of local 74, *not* the members, that UTU breached its duty of fair representation under the Railway Labor Act (45 U.S.C. 151 *et seq.*) by not following its constitution to arrange a "fair and *equitable* division of the work involved" (emphasis added) in a permanent diversion of traffic occasioned by the Congressional creation of the Consolidated Rail Corporation April 1, 1976, should be tried to a jury, the majority of the panel failed to apply pertinent Sixth Circuit precedent applying decisions of this Court, as pointed out by Judge Wellford in dissent. 881 F.2d at 290-91; 19a-20a. In *Wood v. Int'l Bhd. of Teamsters*, 807 F.2d 493, 504 (6th Cir. 1986) (Contie, J., concurring), Judge Contie stated in his concurrence that in determining entitlement to jury trial, the focus is on the nature of the issue to be tried (citing *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)), and that the issue of whether a union has breached its duty of fair representation is equitable in nature. A unanimous panel of the Sixth Circuit relied upon Judge Contie's concurring opinion in *Wood* to explicitly hold there was no right to jury trial in a

"hybrid" action against a union seeking backpay damages. *Deringer v. Columbia Transp. Division*, 866 F.2d 859 (6th Cir. 1989).

Rather than applying the relevant Sixth Circuit precedent on the jury trial issue, the majority of the panel here applied the holdings in *Terry v. Chauffeurs, Teams. & Helpers, Local 391*, 863 F.2d 334 (4th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3826 (1989) and *Quinn v. DiGuilian*, 739 F.2d 637 (D.C. Cir. 1984) (881 F.2d at 288; App. at 14a) because Local 74 sought "compensatory damages," rather than the more convincing precedent outside the circuit on the jury trial issue, *Leach v. Pan American World Airways*, 842 F.2d 285, 290-91 (11th Cir. 1986) (no right to jury trial as to duty of fair representation claim). The recent grant of *certiorari* by the Court in *Terry v. Chauffeurs, Teams. & Helpers, Local 391, supra*, (57 U.S.L.W. 3826 (1989)) (one of the principal cases relied upon by the majority of the panel), noted by Judge Wellford in dissent (881 F.2d at 291 n.1; App. at 20a n.1), makes clear that the petition should be granted to resolve the clear conflict in circuits on the jury trial issue.

II. THE DECISION BELOW FAILS TO APPLY DECISIONS OF THIS COURT CONCERNING THE DUTY OF FAIR REPRESENTATION IN SENIORITY ADJUSTMENT MATTERS.

Since this matter had been fully tried before the district court and resolved favorably to UTU, the majority of the panel had to decide whether a directed verdict was warranted on the claim of breach of duty and the defense of failure to exhaust the internal union remedies. 881 F.2d

at 283, 289-90; App. at 2a, 16a-18a. Although acknowledging the "wide range of reasonableness" UTU had in resolving the competing seniority claims of employees in negotiations (*Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *see also, Humphrey v. Moore*, 375 U.S. 335 (1964)), the majority of the panel here held the principle inapplicable because it characterized the claim of Local 74 as " . . . not that their complaints were unfairly resolved, but rather that the union refused properly to consider their claims." 881 F.2d at 290; App. at 17a-18a. The majority opinion cites no precedent on this point,[2] and it is clearly at odds with the holdings of the Court in *Ford Motor Co. v. Huffman, supra*, and *Humphrey v. Moore, supra*. It is submitted that reasonable minds on a jury would have come to the same conclusion as the district court (App. at 42a-51a) considering the standards in *Ford Motor Co. v. Huffman* and *Humphrey v. Moore*. The circuit court here failed to apply this decisive precedent from the Court.

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[2] It has been held that a union representing employees under the Railway Labor Act is not required to consult with employees or to give them notice of contemplated contractual actions. *McMullans v. Kansas, Oklahoma & Gulf Ry.*, 229 F.2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956). This seems to state the obvious given the exclusive representative status of a duly designated union, which makes the foray of the majority of the panel into a new area of fair representation (cognizability of claim for failure to consider complaints rather than unfair resolution of competing seniority claims) all the more incomprehensible.

III. THE DECISION BELOW MISAPPLIED THE LAW FROM THIS COURT CONCERNING THE REQUIREMENT TO EXHAUST INTERNAL UNION REMEDIES.

In considering the exhaustion of internal union remedies issue, the majority of the panel failed to acknowledge that *road* equity had been granted in the internal appeal process to members of the *same local*, a fact that was decisive to the district court (and, it is submitted, would have been to reasonable minds on a jury) in rejecting Local 74's claims of futility and hostility in appealing for *yard* equity in the same local. App. at 39a-40a. The majority's resolution of this issue in applying the principles of *Clayton v. Int'l Union, United Auto Workers*, 451 U.S. 679 (1981) demonstrates its misapplication of this Court's holding therein, for they would require not only that the remedy not be futile and free from hostility, but would require UTU itself to prove their rights to seniority equity (881 F.2d at 289; App. at 16a-17a).

CONCLUSION

For the foregoing reasons, Petitioner United Transportation Union respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

Page

Opinion of the Court of Appeals for the Sixth Circuit in *United Transportation Union, Local 74 v. Consolidated Rail Corp.* (July 31, 1989) (881 F.2d 282) 1a

Order of the Court of Appeals for the Sixth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc (October 16, 1989) 22a

Findings of Fact, Conclusions of Law, and Judgment of the District Court for the Northern District of Ohio, Western Division in *United Transportation Union, Local 74 v. Consolidated Rail Corp.* (July 29, 1988)..... 24a

No. 88-3770

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION, LOCAL 74, *Plaintiff-Appellant,* v. CONSOLIDATED RAIL CORP., *Defendant,* UNITED TRANSPORTATION UNION, *Defendant-Appellee.*	)	ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed July 31, 1989

Before: WELLFORD and GUY, Circuit Judges; and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the court, in which GUY, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 17-19) delivered a separate dissenting opinion.

PECK, Senior Circuit Judge. This duty of fair representation case under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, was resolved in favor of defendant United Transportation Union ("UTU") in a bench trial, following the district court's grant of UTU's motion to strike the jury demand made in plaintiff United Transportation Union, Local 74's ("Local 74") Second Amended Complaint. For the reasons stated below, we conclude that Local 74 was entitled to the jury trial that it requested. We

further hold that there are facts upon which reasonable jurors could conclude both that it would have been futile for Local 74 to continue to pursue internal union remedies and that UTU breached its duty of fair representation; therefore, a directed verdict would not have been appropriate and denial of Local 74's demand for a jury trial was not harmless error. *See, e.g. Laskaris v. Thornburgh*, 733 F.2d 260, 264 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984); *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 145 (5th Cir. 1979).

I. Background

On April 1, 1976, eight separate bankrupt railroads, including Erie Lackawanna ("EL") and Penn Central ("PC"), were merged by Congress to form Consolidated Rail Corporation (Conrail),[1] a multi-state rail carrier operating primarily in the northeast quadrant of the United States, under the Regional Railroad Reorganization Act ("3R Act"), 45 U.S.C. §§ 701 *et seq.*[2] UTU is a national labor organization engaged primarily in representing railroad employees for the purpose of collective bargaining throughout the United States pursuant to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* Local 74 is a local constituent of UTU and represents, among others, the former EL employees who worked as trainmen (conductors, brakemen and switchmen) and firemen at the

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[1] Conrail was dismissed as a party to this action on December 20, 1985.

[2] The original 3R Act has been modified and was partly repealed in 1981 by the Northeast Rail Service Act of 1981, 95 Stat. §§ 643-703.

Marion, Ohio yard and on the road. When Conrail came into being, it consolidated former PC and EL yards in the Ohio cities of Marion, Akron, Dayton and Mansfield. As a result of the merger, the number of switchmen needed in EL's former yard operations in Marion dropped immediately from 36 to 9, and eventually down to 3. As of the date of trial, the EL workers had not obtained a single yard job in any Conrail switching yard to which their work was allegedly diverted. However, they did get some road work three years after Conrail's formation.

Local 74 asserts that most of this lost yard work was diverted to former PC switching yards in other Ohio cities. Immediately upon Conrail's formation, the entire main line of the former EL between Chicago and Marion was abandoned; Local 74 claims that the road and yard work that was done at the Marion yard prior to the merger was diverted to the east/west routes of the former PC railroad. Local 74 further maintains that the majority former PC workers controlled UTU and precluded minority former EL workers from obtaining the equity due them in preserving their former work under federal law, existing contracts, and the UTU constitution.

The Act under which Conrail was organized provided that Conrail would initially assume all existing collective bargaining contracts and then negotiate new ones. 45 U.S.C. 772(b) (1976) (repealed 1981). The labor organizations were to negotiate with Conrail as to the procedure for determining seniority, and, "to the extent possible, preserve [workers'] prior seniority rights." 45 U.S.C. § 774(b) (1976) (repealed 1981). Workers with seniority on "the lines, properties, or facilities acquired" were to have prior seniority roster rights on those lines,

properties, or facilities. 45 U.S.C. § 774(a) (1976) (repealed 1981). UTU and Conrail negotiated a bargaining agreement, effective April 1, 1976. All employees were merged into a "dove-tailed" seniority roster according to date of hire by the original railroads. Each employee was given an overriding prior right to positions in the operating area of his former railroad. *See Ratkosky v. United Transportation Union*, 843 F.2d 869, 871-72 (6th Cir. 1988). The agreement also stated that:

> When assignment, allocation, reallocating, reassignment or consolidation of work . . . takes place, the parties will meet to determine an equitable allocation of work involved on a prior right seniority basis. The allocations will be determined on the basis of one or more of the work measurement factors listed below, but not limited to such factors:
>
> 1. Engine hours.
> 2. Cars dispatched.
> 3. Train miles and/or car miles.
> 4. Track miles.
>
> The corporation will furnish all available data necessary for such allocation.

Article 90 of UTU's Constitution also dealt with employee rights following a permanent diversion of work from one carrier to another, by providing that a "General Committee of Adjustment" would arrange a "fair and equitable division of the work," which would preserve prior seniority rights to the extent possible.

UTU management operates on three levels. At the local level, a local chairperson handles members' business, including employee grievances. There have been

two or three local chairpersons for Local 74 at all times since 1976. At the intermediate level, there are several General Committees that are authorized to bargain collectively on behalf of their respective locals. At the third, or international, level, there are a president and several vice presidents, and a Board of Appeals, which is the highest body for resolution of internal disputes. Article 75 of the UTU Constitution provides with respect to appeals that "a subordinate body may appeal an action or decision against it to an appropriate Board of Appeals, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date the action or decision occurred."

Immediately following the merger in 1976, UTU assigned a representative to pursue the former EL workers' rights. The representative promptly asserted the workers' rights, seeking first to show road equity on the theory that establishing road equity would automatically show a right to yard equity. A temporary agreement for road work out of Toledo, Ohio was obtained, but was resisted by UTU General Chairman Swert, who claimed that Local 74 could show no equity in the merged system because it could not identify the particular trains that had been diverted. UTU's vice president rejected Swert's view, finding that some portion of the former EL work had been diverted to PC yards. This decision was appealed to the Union Board of Appeals by representatives of several former PC groups; in denying the appeal the Board stated that there is no such thing as an "identifiable" train, so equity must be determine on other bases. It appears that some road jobs for EL workers resulted from this sequence of events (ending in 1979); however,

no yard jobs were obtained and Local 74 asserts that, unbeknownst to it or the workers (and contrary to the assurances of their appointed representative), yard jobs for former EL employees had not even been negotiated with UTU at that point. Local 74 contends that the availability of reliable data for determining an equity claim declined as time elapsed.

In 1979, Chairman Swert was assigned by UTU as Local 74's committee representative. The employees continued to pursue their claims. In 1981, Local 74 representatives pressed UTU with their claim for yard work for the former EL workers. Vice-president J.R. Wells was assigned to the dispute. In October 1981, Wells reported the impossibility of establishing the exact location of any group's equity, and recommended simply merging seniority rosters. The UTU president did not act on this recommendation, but rather referred Local 74 back to Swert and the PC representatives, dismissing Wells from any duties in relation to the dispute. In 1982, Local 74's counsel wrote a letter on behalf of Local 74 to the UTU president requesting a dovetail of seniority rosters or other equitable remedy for the former EL yard workers. The president responded by again referring the matter back to Swert. Two months later, Local 74 filed this action.

Local 74's Second Amended Complaint set forth numerous allegations of arbitrary, discriminatory and bad faith conduct by UTU in failing to respond to Local 74's inquiry concerning yard jobs. In its prayer for relief, Local 74 requested compensatory and punitive damages, as well as "an injunction ordering and requiring defendants to immediately take all reasonable and necessary

steps to obtain for plaintiffs a fair and equitable division of all former EL work which has been diverted since April 1, 1976 to former PC terminals." Local 74 concedes that compensatory damages are mitigated to the extent former EL workers received any monthly displacement allowances between 1976 and 1981 under 45 U.S.C. § 775(b) (1976) (repealed 1981).[3]

II. Right to Jury Trial

There is a conflict among the circuits as to the right to a jury trial in the context of breach of duty of fair representation cases in which legal remedies are sought.[4] The unchallenged rule prior to two Supreme Court rulings, *United Parcel Service Inc. v. Mitchell*, 451 U.S. 56 (1981) and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), was that under *Curtis v. Loether*, 415 U.S.

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[3] Under 45 U.S.C. § 775(b) ("Title V") (1976) (repealed 1981), a railroad worker with more than five years' experience who lost his job was entitled to a monthly cash payment until he reached the age of 65. Title V was replaced by Title VII, 45 U.S.C. § 797 (1982), which provided a displaced worker with benefits not to exceed $20,000 over his lifetime.

[4] The issue has been examined in cases in which the defendant union's duty of fair representation arose in actions concerning both § 301 of the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, and the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* Courts have refused to distinguish between the two acts for purposes of fair representation suits. *See Leach v. Pan American World Airlines*, 842 F.2d 285, 287 n.2 (11th Cir. 1988) (citations omitted); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 221 (5th Cir. 1984) (citations omitted). Therefore, we will consider cases brought pursuant to either act to have similar precedential effect.

189 (1974) there existed a right to trial by jury in such cases. *See Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 143 (5th Cir. 1979); *Minnis v. UAW*, 531 F.2d 850, 853 (8th Cir. 1975). A case decided after 1983 but not considering the potential effect of *Mitchell* and *DelCostello* reached the same result. *See Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 220 (5th Cir. 1984). The eleventh circuit has decided that the recent Supreme Court rulings undermine the analysis behind the former rule and compel the denial of any right to a jury trial in a duty of fair representation case. *Leach v. Pan American World Airways*, 842 F.2d 285, 290-91 (11th Cir. 1988). Conversely, two other circuits considering the influence of *Mitchell* and *DelCostello* have determined that the issue addressed in those cases did not significantly help in making the legal/equitable characterization that is essential to resolution of the jury issue. These courts came to the conclusion that litigants have a right to jury trial in duty of fair representation cases in which legal remedies are sought. *Terry v. Chauffeurs, Teamsters & Helpers, Local 391*, 863 F.2d 334, 339 (4th Cir. 1988); *Quinn v. DiGiulian*, 739 F.2d 637, 646 (D.C. Cir. 1984). Because we agree that the Supreme Court cases have little bearing on the nature of duty of fair representation cases for seventh amendment purposes, and because we are persuaded that the character of this action is legal, we join these latter circuits in concluding that there is a right to trial by jury in this case.

The seventh amendment to the United States Constitution states that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." The seventh amendment applies if an "action involves rights and

remedies of the sort typically enforced in an action at law." *Curtis v. Loether, supra,* at 195. Thus, the seventh amendment covers all suits that are not of equity or admiralty jurisdiction. *Id.* at 193; *Ross v. Bernhard,* 396 U.S. 531, 533 (1970); *Parsons v. Bedford,* 3 Pet. 433, 446-47 (1830). Whether there is a right to jury trial in a particular case depends on the nature of the issue to be tried rather than the character of the overall action. *Ross* at 537-38. Consequently, the right to a jury trial on legal issues must be preserved in a case presenting both legal and equitable issues. *See Hildebrand v. Board of Trustees of Michigan State University,* 607 F.2d 705, 707 (6th Cir. 1979), *cert. denied,* 456 U.S. 910 (1982) (citing *Dairy Queen v. Wood,* 369 U.S. 469 (1962); *Beacon Theatres Inc. v. Westover,* 359 U.S. 500 (1959)).

The " 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Ross, supra,* at 538 n.10. After *Curtis v. Loether, supra,* the primary focus in this circuit in analyzing the nature of an issue for seventh amendment purposes in on the second consideration set forth in *Ross,* the type of relief sought. *Hildebrand, supra,* at 708. If a party seeks solely injunctive relief or backpay, the relief sought is equitable and there is no right to a trial by jury. *See, e.g., Harris v. Richards Mfg. Co.,* 675 F.2d 811, 815 n.2 (6th Cir. 1983); *Moore v. Sun Oil Co.,* 636 F.2d 154, 156 (6th Cir. 1980); *Hildebrand, supra,* at 708. A party seeking compensatory damages or punitive damages is entitled to a jury trial. *Moore, supra,* at 157; *Hildebrand, supra,* at 708. We observe that punitive

damages, though requested in this action, are not available in breach of duty of fair representation cases. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 52 (1979); *see also Quinn v. DiGiulian*, 739 F.2d 637, 647 (D.C. Cir. 1984) (*Foust* establishes *per se* rule barring recovery of punitive damages in duty of fair representation cases). Therefore, to the extent that the nature of this action depends on the nature of the relief sought, the request for punitive damages will not be considered.

In addition to the prayer for punitive damages and injunctive relief, the Second Amended Complaint contained a prayer for "compensatory damages." We hold that the nature of the remedy requested by Local 74, insofar as it prays for compensatory damages, is legal. If backpay were the only harm for which Local 74 could seek compensation, that prayer would possibly be wholly equitable, *See, e.g., Harris, supra. But see Massey v. Whittaker Corp.*, 661 F.Supp. 1151, 1153 (N.D. Ohio 1987) (backpay, characterized as breach of contract remedy, is legal remedy absent specific statutory language justifying equitable characterization). Without exhaustively listing all bases upon which compensatory relief could be based in this case, we observe that the former EL employees might have viable compensable claims for other damages arising out of their inability to secure work at the EL yard, such as expenses in moving to find other employment and excessive expenses incurred in pursuing internal remedies. This court recently declined to establish a *per se* rule regarding the right to jury trial in duty of fair representation cases in *Deringer v. Columbia Transportation Division, Oglebay Norton Co.*, 866 F.2d 859 (6th Cir. 1989). *Id.* at 862. *Deringer's* denial of any right to a jury trial was

premised on the purely equitable nature of relief sought by plaintiffs there. *Id.* at 863. Because of this distinction, we conclude that *Deringer* does not control the issue of the seventh amendment right to jury trial in cases, such as this one, in which legal remedies are demanded. *Cf. Wood v. International Brotherhood of Teamsters*, 807 F.2d 493, 504-05 (6th Cir. 1986) (Contie, J., concurring), *cert. denied*, 107 S.Ct. 3232 (1987).

In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), the Supreme Court considered which of two state statutes of limitations was appropriate in an action by employees against their employer for breach of their collective bargaining agreement. The Court decided that the action on the agreement was more closely analogous to a suit for vacation of an arbitration award than it was to a typical contract action because to prevail, employees would be required to show, *inter alia*, that the union breached its duty of fair representation. *Id.* at 62. Consequently, the Court held, the statute of limitations for vacation of an arbitration award was appropriate in that action. *Id.* at 64. The Court did not consider the applicability of any federal statute of limitations, as that issue was not properly brought before it. *Id.* at 60 n.2. In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Court examined a case similar to *Mitchell*, but considered two additional points which *Mitchell* had left open. First, the Court decided that suits against a union for breach of duty of fair representation should be governed by the same statute of limitations as those against an employer for violations of the bargaining agreement. *DelCostello* at 155. Second, the Court stated that a federal rather than a state statute of limitations

should be "borrowed" in actions with no clearly defined statute when the federal intent would be hindered by using a state statute. *Id.* at 162. The Court noted that a claim against an employer for breach of the collective bargaining agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, and a claim against a union for breach of the union's duty of fair representation are "inextricably interdependent" because to prevail on either claim it would be necessary to demonstrate that there was an action contrary to the contract and that there was a breach of duty by the union. *Id.* at 164-65 (citations omitted). The Court held that the most appropriate statute of limitations to apply to such actions would be the 6-month statute of limitations for making charges of unfair labor practices to the NLRB, set forth at § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), because of the similarities between the actions and the appropriateness to the breach of contract/duty of fair representation action of the considerations set forth by Congress in formulating a 6-month limitations period. *Id.* at 170-71.

In *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984) the D.C. circuit held that there was a right to jury trial in an action solely against a union and its representatives for breach of their duty of fair representation. *Id.* at 646. Noting that the nature of remedies authorized and sought is central to the jury trial issue, the *Quinn* court stated that the determination in *DelCostello* that duty of fair representation suits have "no close analogy to ordinary state law so as to recommend a particular state statute of limitations" offers little support for the argument that a duty of fair representation action is equitable in nature

for seventh amendment purposes. *Id.* Conversely, the eleventh circuit in *Leach v. Pan American World Airlines*, 842 F.2d 285 (11th Cir. 1988) held that there is no right to jury trial in breach of duty of fair representation cases. *Id.* at 290-91. The *Leach* court stated that *Mitchell* and *DelCostello* toppled the rationale behind the former rule that litigants in duty of fair representation suits were entitled to jury trial because that rule was based on the rationale that fair representation suits closely resembled common law tort actions, whereas the Supreme Court cases expressly rejected the view that fair representation cases had any close analogy to ordinary state law. *Id.* at 287. The court discussed the fact that the remedies against the employer are "clearly equitable" and, under *DelCostello*, the claims against the employer and the union were held to be "inextricably interdependent." Therefore, the court reasoned, if one examines the right to jury trial by characterizing the nature of the remedy, the duty of fair representation action must also be viewed as an equitable one that does not invoke the seventh amendment right to trial by jury. *Id.* at 287-88. The *Leach* court concluded that duty of fair representation claims must be analogized to unfair labor practice charge claims. *Id.* at 289. There is no right to jury trial on unfair labor practice claims; thus, the court concluded, no right to jury trial exists in duty of fair representation cases. *Id.* at 290. In *Terry v. Chauffeurs, Teamsters & Helpers, Local 391*, 863 F.2d 334 (4th Cir. 1988), the fourth circuit adopted the reasoning of *Quinn* and rejected that of *Leach* in deciding that the fact that a hybrid action has no close analogy to state law does not resolve the legal/equitable determination necessary for seventh amendment analysis; rather, the

key to the inquiry is the nature of the remedy sought. *Terry* at 338.

We adopt the reasoning set forth in *Quinn* and *Terry* in finding a right to jury trial here. Noting that analogies to state-law actions are helpful in seventh amendment analysis, the *Terry* court stated:

> [T]he absence of a single clear analogy does not preclude a determination that a statutory action involves "rights and remedies of a sort typically enforced in an action at law." *Curtis [v. Loether, supra,]*, 415 U.S. at 195, 94 S.Ct. at 1008-1009. . . . *Ross [v. Bernhard, supra]* and *Curtis* made clear that the nature of the claims and remedies determine whether a right to a jury trial is present, *not* the overall nature of the action. Making a law/equity determination for seventh amendment purposes is a far different task than choosing a statute of limitations in a labor-law context. While the hybrid action we consider is the same kind of action the Supreme Court considered in *Mitchell* and *DelCostello*, there is no need for us to treat the hybrid action as an indivisible whole when performing a seventh amendment analysis. Indeed, the *Beacon Theatres [Inc. v. Westover, supra,]* line of cases instructs us to do just the opposite.

Terry at 338. The court went on to state that there is no "bright-line rule" stating which specific issues in a hybrid § 301/duty of fair representation case are subject to the seventh amendment requirement of a jury trial, holding that either party is entitled to a jury trial of identifiable legal issues. *Id.* at 338-39. We do not find persuasive the argument that the equitable nature of claims against an employer compels us to view derivative claims against a union also to be equitable; while the two claims are

indisputably "inextricably interdependent," *DelCostello* at 164-65, there is no compelling reason that the claim against the union should not be subject to trial by jury. The Court in *DelCostello* based its decision in part on the impracticability of permitting a longer statute of limitations on claims against the union, for the union would usually only be responsible for increases in a plaintiff's damages caused by its breach of duty. No similar consideration exists in the present case. Indeed, we observe that even if this were a hybrid § 301/duty of fair representation case, the legal and equitable claims are easily separable, as disposition of the duty of fair representation claim is an "indispensable predicate" for a hybrid action. *See Mitchell, supra,* at 62.

When there is no functional justification for denying it, the seventh amendment right to trial by jury "must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether, supra,* at 195. Trial by jury in a breach of duty of fair representation case does not present formidable functional barriers. Because the relief sought here is, in part, legal in nature, we conclude that Local 74 was entitled to trial by jury.

III. EXHAUSTION OF INTERNAL UNION REMEDIES

Courts generally require employees to exhaust internal union remedies before bringing suit against the union when adequate remedies are available through internal union channels. *See Clayton v. UAW,* 451 U.S. 679, 696 (1981); *Geddes v. Chrysler Corp.,* 608 F.2d 261, 264 (6th Cir. 1979). However, it is well settled that futility is an excuse

for failure to exhaust internal union remedies. *Glover v. St. Louis-San Francisco Railroad Co.*, 393 U.S. 324, 329 (1969). Specifically, employees need not resort to internal union remedies if it would be futile to do so because the position of the union is clearly "hardened" against them. *Geddes, supra,* at 265. It is clear that Local 74 did not exhaust all available internal union remedies, for it could have appealed to the Union Board of Appeals the October 1981 decision by the UTU president not to merge seniority rosters to establish yard equity (and his subsequent refusal to alter this decision). Local 74 contends that it should be excused from the exhaustion requirement because UTU was clearly hostile toward the position of the employees. We hold that Local 74 presented sufficient evidence to preclude a directed verdict on this issue.

In *Geddes, supra,* this court held that resort to intra-union remedies might be futile because the employees in that case were confronted with apparent acquiescence by their union in an action taken by their employer that was unfavorable to them. *Id.* at 265. This court also stated that

> the mere passage of time is seen as militating against requiring the plaintiffs to go back now and plead their case to the union Appeals Board or the union president; the union has been aware of this dispute concerning its members for five years and has had sufficient time to "set its own house in order," which is the primary purpose of the exhaustion requirement.

Id. Here, Local 74 has presented evidence that it diligently pursued its claims for six years before bringing this action. Although appeal of the claim for yard equity to the Union Board of Appeals was never made, we

would find Local 74's excuse, if proven, adequate, that it was unable to obtain necessary data for establishing equity because of procrastination and stonewalling by UTU officials. We observe that UTU officials may have misled employees as to the status of negotiations concerning yard equity and, following the 1979 Board of Appeals decision in which it was determined that equity could not be shown by identifying specific diverted trains, the officials continued to insist that equity could not be granted absent identification of diverted trains. If Local 74 is found to have faced this sort of hostile situation, we would conclude that further pursuit of internal union remedies would be futile, obviating the need to exhaust internal union remedies.

IV. DUTY OF FAIR REPRESENTATION

The duty of fair representation is grounded in labor organizations' exclusive right to represent all unit employees in collective bargaining, thereby depriving individuals of the ability to bargain individually or select a minority union as their representative. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 n.14 (1983). In order to permit individual employees to protect their own interests, the representative organization has a duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). The test of whether the duty to represent has been upheld by a union seeking to accommodate two conflicting groups is whether a rational method was used to resolve the conflict. *Humphrey v.*

Moore, 375 U.S. 335, 349-50 (1964). Because of the conflicting and often irreconcilable interests of classes of employees represented by a union, unions are afforded a "wide range of reasonableness" in representing employees. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

Local 74's claim here is that UTU clearly had a duty to negotiate with former EL employees as to equity concerning diverted work, but ignored that duty and, in fact, hindered the employees' efforts in attempting to assert seniority rights by delaying action and failing to compile the proper data. Although the union would indeed have wide discretion in actually reconciling conflicting employee interests, the allegations here are not that their complaints were unfairly resolved, but rather that the union refused properly to consider their claims. The test of whether the union properly resolved the conflicts presented does not apply where the union allegedly failed for six years diligently to consider the merits of the claims asserted. Therefore, a directed verdict for UTU on the issue of duty of fair representation would not be appropriate and this would not be a basis for affirming the district court's judgment.

Accordingly, the judgment of the district court is vacated and this case is remanded for further proceedings consistent with this opinion.

WELLFORD, Circuit Judge, dissenting:

The issue is whether the local union representing plaintiffs in this case is entitled to a jury on the question whether the international union (UTU) breached its duty of fair representation. The majority opinion refers to the

union constitution's provision in the situation of permanent diversion of work assignments from one railroad carrier to another to arrange a "fair and *equitable* division of the work involved" (emphasis added). The dealings between the union and the members who had worked for Erie Lackawanna (EL) involved what is described as "road equity" and "yard *equity*." (In this case the latter is the real issue). In the prayer for relief the local union on behalf of former EL yard workers requested that UTU, "*take* all *reasonable* and necessary steps" to obtain for plaintiffs a "fair and equitable division of all former EL work." (Majority opinion pp. 6, 7). Because plaintiffs concede that they received "monthly displacement allowances" while they were not doing yard work that was formerly done by them when working for EL, it is clear that equitable or backpay relief was their overriding interest, not compensatory damages.

I find that precedent in this circuit compels a finding that no jury right exists in a hybrid action against a union. Judge Contie of this court suggested this result in his concurring opinion in *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493, at 504 (6th Cir. 1986):

> In determining whether the right to a jury trial exists for a newly-created action, the focus is "on the nature of the issue to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S. Ct. 733, 738, 24 L. Ed.2d 729 (1970)
>
> * * *
>
> The individual issues presented in this case, as in any hybrid § 301 action, are whether the Union breached its duty of fair representation and whether the employer, Kroger, breached the

> collectively bargained labor contract. I would find that the fair representation issue is equitable in nature, and therefore not triable to a jury, because the primary relief sought for breach of the duty of fair representation is equitable.

We relied on Judge Contie's concurrence and explicitly held that a plaintiff did not have a jury right in a hybrid action against his union in *Deringer v. Columbia Transp. Division*, 866 F.2d 859 (6th Cir. 1989) (citing, in addition, *Hildebrand v. Bd. of Trustees of Mich. St. Univ.*, 607 F.2d 705, 708 (6th Cir. 1979), *cert. denied*, 456 U.S. 910 (1982)). *See also Chrysler Workers Assn's v. Chrysler Corp.*, 663 F.Supp. 1134 (N.D. Ohio 1986), *aff'd* 834 F.2d 573 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 2017 (1988).

The majority, I believe mistakenly and contrary to our normal procedures, looks to other circuits for authority to reverse the district court in this case instead of relying on authority in this circuit. *Terry v. Chauffeurs, Teams. & Helpers, Local 391*, 863 F.2d 334 (4th Cir. 1988) concedes that LMRA actions, "and other labor law statutes do not neatly fit any mold of traditional common law actions" (which would mandate a jury trial) but held that a declaratory action complaint in a § 301 action "raises legal issues . . . [including] a resolution by the jury of disputed facts concerning whether the agreement was breached." *Id.* at 339. *Terry*, however, conceded that back pay claims and injunctive relief may be equitable in nature, but held that intertwined claims having both legal and equitable characteristics may be heard by a jury. *Id.* at 338 (citing *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984)).[1] To the extent the court feels compelled to rely on

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[1] It should also be noted that the Supreme Court granted certiorari in the *Terry* case. Perhaps the court will resolve this apparent split in the circuits. *See* 57 U.S.L.W. 3826 (1989).

authority outside this circuit, I find the reasoning of *Leach v. Pan American World Airways*, 842 F.2d 285, 290-91 (11th Cir. 1986) to be persuasive on the question before us. It holds that because the issue presented in this type of case is essentially equitable in nature, no jury trial right exists.

I would affirm the district court because I believe Sixth Circuit authority clearly indicates that plaintiff is not entitled to a jury trial in this § 301 case. I accordingly **Dissent.**

No. 88-3770

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION, LOCAL 74	)	
Plaintiff-Appellant,	)	
v.	)	
CONSOLIDATED RAIL CORPORATION,	)	ORDER
Defendant,	)	(Filed Oct. 16, 1989)
UNITED TRANSPORTATION UNION,	)	
Defendant-Appellee	)	

BEFORE: WELLFORD and GUY, Circuit Judges; and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED TRANSPORTATION UNION LOCAL 74, Plaintiff, -vs- CONSOLIDATED RAIL CORPORATION, et al., Defendants.	No. C 82-467 *FINDINGS OF FACT CONCLUSIONS OF LAW and JUDGMENT* (Filed Jul 29, 1988)

* * *

WALINSKI, J.

This cause came on for trial to the Court from February 4, 1986 to February 14, 1986, and after the filing of the transcript and then post-trial briefs and memoranda, became decisional on February 23, 1987. The following discussion will comprise this Court's findings of fact and conclusions of law.

PARTIES

Plaintiff United Transportation Union, Local 74 (Local 74) is a local constituent of the defendant United Transportation Union, and is the result of a merger of Local 74 and Local 209. Plaintiff Local 74 originally represented only the engine service ("firemen") craft for Erie-Lackawanna Railroad (EL) who worked at the Marion, Ohio yard (including the Dayton, Mansfield and Akron satellite yards) and on EL lines in and out of Marion. Local 209 represented the conductors, brakemen and

switchmen (collectively, the "trainmen") at the same locations. Local 209 merged into Local 74 as of October 31, 1976. Thus, Local 74 now represents the remaining EL employees both firemen and trainmen, at the Marion yard and road, including its satellite yards.

The defendant United Transportation Union (UTU) is a national labor organization engaged generally in representing railroad employees for the purpose of collective bargaining throughout the United States pursuant to the Railway Labor Act, 45 U.S.C. §151 *et seq.*

Although no longer a party (having been dismissed December 20, 1985) it is also necessary to consider Conrail, since its formation, by law, gave rise to the issues herein. Conrail was established via the Regional Railroad Reorganization Act ("3R Act"), codified at 45 U.S.C. §§701-709, as amended. The original law has been modified and was partly repealed in 1981. Congress created Conrail as a multi-state rail carrier, primarily in the northeast quadrant of the United States, to take over and operate the routes and properties of several bankrupt railroads. These bankrupt railroads included Penn Central (PC), (itself a result of the merger of the New York Central (NYC) and Pennsylvania (PRR) railroads); and the Erie-Lackawanna(EL). Conrail commenced rail operations as an entity on April 1, 1976.

THE CONRAIL SENIORITY SYSTEM

This action concerns the seniority rights of members of Local 74 in the newly organized Conrail system. The 3R Act provided that Conrail would initially assume existing collective bargaining agreements with the various

trade unions representing railroad workers and then negotiate new agreements. 45 U.S.C. §772(b) (1976)(repealed 1981). Any new agreement was to ensure that the workers "who have seniority on the lines, properties, or facilities acquired . . . shall have prior seniority roster rights on such acquired lines, properties, or facilities." 45 U.S.C. §774(a)(repealed 1981). The statute mandated further that Conrail and the labor organizations negoatiate "the procedure for determining the seniority of such employees in their respective crafts or classes on [Conrail's] system which shall, to the extent possible, preserve their prior seniority rights." 45 U.S.C. §774(b)(4)(repealed 1981).

In accordance with the Congressional mandate, UTU and Conrail negotiated a bargaining agreement in 1975. Seniority rights under the 1975 Agreement were determined by "a complicated two-tiered system. First, all Conrail employees were merged into a 'dove-trailed' seniority roster according to the date each employee was hired by the original railroad. Second, each employee was given a prior right to positions in the operating area of the employee's former railroad." *Ratkosky v. United Transportation Union*, 843 F.2d 869,871 (6th Cir. 1988). This "prior rights" seniority system was well known in the rail industry and had previously been utilized in various mergers involving both EL and PC lines. (Tr. at 315, 387-394, 586-587).[1]

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[1] References to "Tr." are to pages in the four-volume trial transcript.

In order to effect the economies envisioned by Congress, Section 503 of the 3R Act allowed Conrail to "assign, allocate, reassign, reallocate, and consolidate work . . . ." 45 U.S.C. §773 (repealed 1981). Specifically:

> The Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act . . . .

Id.

Where such diversions of traffic took place, and seniority rights were affected, UTU was governed by the terms of its Constitution. UTU's Constitution provides at Article 90:

> When, through lease, purchase, merger, consolidation, or other cause, a line or lines of a carrier or a portion thereof is taken over by another carrier . . . or for other reasons traffic is permantly diverted from one carrier to another or from one road and/or yard seniority district to another on the same carrier and such affects the seniority rights of employees on such carriers, General Committees of Adjustment *shall arrange for a fair and equitable division of the work.* Prior seniority rights of employees to service on their

> former seniority district or territory shall be preserved to the extent possible.

(Defendant's Ex. 2b, 2c) (emphasis added).[2]

As a reflection of the 3R Act and UTU Constitution, the 1975 Agreement negotiated between UTU and Conrail incorporated both "prior rights" and the concept of an "equitable allocation" where work was transferred or diverted. In pertinent part, the 1975 Agreement provided that:

> When assignment, allocation, reallocation, reassignment or consolidation of work, pursuant to Section 503 of the Act, takes place, *the parties will meet to determine an equitable allocation of work involved on a prior right seniority basis*. The allocations will be determined on the basis of one or more of the work measurement factors listed below, but not limited to such factors:
>
> 1. Engine hours.
> 2. Cars dispatched.
> 3. Train miles and/or car miles.
> 4. Track miles.
>
> The corporation will furnish all available data necessary for such allocation.

(Plaintiff's Ex. 7A at Article VII) (emphasis added).[3]

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[2] References to exhibits are to those admitted at trial. (Plaintiff and Defendant both used numerals to designate their exhibits).

[3] Generally, in yard consolidations, the percentage of work was actually computed on the basis of pre-merger engine hours. (Tr. at 294, 336-337)

BACKGROUND

The parties differences arise out of the loss of work at the former EL rail yard at Marion, Ohio. The Marion, Ohio yard had been a major classification yard on the former EL, for east-west traffic moving on the main line between the western end of the EL at Chicago and the eastern end in New York-Northern New Jersey. (UTU Ex. 7). The classification work in Marion was essentially switching the cars on and off the trains into a most efficient order for pick-up or delivery along the railroad line or at the end of the line.

When the EL was made a part of Conrail, it was determined that Conrail would not acquire the EL line west of Marion, Ohio all the way to Chicago, Illinois thereby eliminating that former EL line as a through east-west line. With that line west of Marion abandoned, Marion would no longer be a major east-west classification yard. Rather, it would continue doing just the yard switching required by local industry in the Marion area, i.e., the switching of cars on and off the trains for delivery or pick-up to or from Marion industry.

With the loss of its role as a classification yard for east-west EL traffic immediately upon the start-up of Conrail, the number of yard crews at Marion was cut from approximately 36 to 9. (Tr. at 38, 53, 92). These nine crews performed the Marion industry switching work that remained. (Tr. at 109, 183-184). The nine crews were reduced near the end of 1976 to six and thereafter declined to approximately two or three yard crews. (Tr. at 53-54.

After its start-up, Conrail began serving notices on UTU that it was consolidating yards. This initiated negotiations between UTU and Conrail for equity allocations of work. Conrail consolidated former PC yards with former EL yards located within the cities of Marion, Akron, Dayton and Mansfield. (Tr. at 331; Defendant's Ex. 86 refering to project numbers 503-4 for Marion, 503-31 for Akron, 503-2 for Dayton and 503-3 for Mansfield). In each case, EL and PC yard rosters received their percentage of the combined work. (Tr. at 99-100, 124-127).

Plaintiff, however, asserts that Conrail transferred virtually all of the Marion yard work formerly performed by Local 74 members to other cities. Specifically, plaintiff contends that the former EL east-west traffic that Marion yard workers had classified was transferred to Conrail's Buckeye yard in Columbus, Ohio, a former PC yard, to Conrail's Stanley yard in Toledo, also a former PC yard, or to some other yard. The failure of UTU to obtain an equity percentage for Local 74 members at these yards, or alternatively, the failure to adopt strict date-of-hire dovetailed seniority rosters at affected yards (if the amount of work could not fairly be traced) is at the root of plaintiff's unfair representation claims.

PLAINTIFF'S CLAIMS

Plaintiff complains that , as a politically weak faction in the merged railroad system, its members were discriminated against when they failed to receive an equitable allocation of the yard work previously handled in Marion. Pursuant to the Railway Labor Act, 45 U.S.C. §151 *et*

seq., plaintiff asserts at ¶19 of the second amended complaint that UTU committed an "intentional and willful breach" of its duty of fair representation.

More particularly, plaintiff alleges that UTU (a) knowingly failed to take steps to obtain an equitable allocation of work when 33 of the 36 yard jobs at Marion were lost; (b) knowingly sacrificed the interests of a political "minority" (EL) in favor of the "majority" (PC); (c) failed to take steps to have Conrail retain necessary data to provide a fair and equitable division of the work; (d) failed to correct an obvious injustice; (e) arbitrarily refused to consider an equitable means of correcting the injustice by using a straight date-of-hire dove-tailed seniority system; (f) deprived plaintiff's members of seniority rights contrary to UTU's Constitution and the statutes; (g) failed to obtain an equitable share of work moved to locations other than their own; and (h) engaged in a nine-year course of hostile discrimination against EL and in favor of PC employees.

UTU'S DEFENSES

As a threshold argument, UTU contends that plaintiff's action is barred by the statute of limitations. UTU also insists that plaintiff failed to exhaust internal union remedies before filing suit.

If the Court reaches the merits of this case, UTU argues that it did not act in bad faith or arbitrarily in failing to obtain the yard equity desired by plaintiff. It is UTU's position that typically, yard equity is claimed and given only where the railroad designates actual yard

consolidations. Otherwise, transferred work is not reasonably identifiable. Furthermore, UTU maintains that no Marion yard work went to Columbus or Toledo. In addition, UTU asserts that replacing the "prior rights" system with a straight date-of-hire roster would have been contrary to the UTU Constitution and past practice and detrimental to a majority of its membership. Finally, UTU describes the claim of favoritism toward former PC employees as groundless.

UTU COMMITTEE STRUCTURE

The UTU operates on three levels pursuant to its Constitution. At the local level, a local chairperson handles the business of its members including employee grievances. After the merger of Local 209 into Local 74, there remained three Local 74 chairmen, one for the fireman craft, one for yard trainmen and one for road trainmen. From 1976 to 1979, the local Chairman for Marion yardmen was V. Masronardi and then J. Chapman. Eventually, the trainmen chairs were combined into one position. Since 1979, local chairmen for plaintiff have been J. A. Coulter for the trainmen and C.R. Stone representing the firemen.

At the intermediate level, several General Committees exist which have the authority to bargain collectively on behalf of their respective locals. When Conrail was formed, EL trainmen in the Marion local were under the Western District General Committee headed by General Chairman W. F. Murphy and Vice Chairman C. R. Bethge. EL firemen in the local were under a separate General

Committee. On October 1, 1977, several trainmen committees merged to form the "Conrail North" General Committee, for which L. W. Swert from the PC was elected as General Chairman.

The third level of UTU organization is the international, which may upon request assist with collective bargaining. It includes a Board of Appeals, the highest level for resolution of internal union disputes. The officers at this level include a President and various Vice Presidents.

STATUTE OF LIMITATIONS

Initially, defendant asserts that plaintiff's claims are barred by the applicable statute of limitations. In its Memorandum and Order of January 31, 1988 denying defendant's motion for summary judgment, this Court at pages 4-5 of the slip opinion applied a six month limitations period[4] and found as follows:

> Suit in this case was filed on or about August 4, 1982. Accordingly, the limitations period would bar claims of unfair representation arising prior to February 4, 1982. . . .
>
> Plaintiff argues that it made repeated efforts to resolve the problem it saw in the implementation of the prior right systems through internal union remedies. It claims that the cause of action did not accrue until the UTU president refused to implement prior rights as applied to former Marion EL yard employees by his letter

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[4] The sixth month period of limitations for breach of fair representation claims applies to actions brought under the Railway Labor Act. *West v. Conrail*, 107 S.Ct. 1538 (1987).

> of June 3, 1982 to plaintiff's counsel. Local 74 argues that once it was informed that UTU would not enforce its December 18, 1985 agreement as to prior rights, suit was brought within two months.
>
> The Court agrees with the holding in *Rogers v. Fedco Freight Lines, Inc.*, 564 F. Supp. 1169 (S.D. Ohio 1983), that "fundamental fairness requires that the statute of limitations not begin to run until it is clear that there are no further remedies which the aggrieved individual can pursue other than the court." *Id.* at 1175. Accordingly, the Court finds that this cause is not barred by the statute of limitations.

The determinative issue, on summary judgment and again after trial, is when or at what point did plaintiff know of UTU's alleged breach of fair representation concerning the yard equity claim. To discern this precise point in time, an abbreviated explanation of the progression of plaintiff's claim within the union structure is in order.

In 1976, Local 74 Chairman V. Mastronardi discussed the equity claim of Marion yard people at the Columbus terminal with General Committee Vice Chairman C. R. Bethge. (Tr. at 423-424). Bethge, along with General Committee Chairman W. F. Murphy, informed the local chairmen in Marion that they did not believe there was any basis for such a yard equity claim. (*Id.*). Bethge, however, requested additional information or data, aside from a list of jobs being worked at the Buckeye yard, which he felt was not enough to substantiate a claim of equity. (Tr. at 434-436).

From late 1976 through 1979, Local 74 Chairman J. Chapman believed, correctly or incorrectly, that plaintiff's yard equity claim was being handled by UTU as part of a road equity claim between three General Committees. (Tr. at 81-82). The result of that dispute was a formula for determining equity allocations developed by UTU Vice President Paul Bennett and upheld by UTU President Chesser. The UTU Board of Appeals affirmed the Bennett resolution on April 6, 1979. The Bennett decision, however, dealt only with road equity.

After the Bennett decision was implemented, in January, 1980, the current Local 74 Chairman J. A. Coulter contacted the General Committee concerning equity at the Columbus yard. (Defendant's Ex. 50). Conrail North General Committee Chairman L. W. Swert reviewed the claim and requested substantiating information. (Plaintiff's Ex. 9). Coulter renewed his request for assistance in April 1980. (Defendant's Ex. 53) and in November 1980, Local 74 again contacted Swert. (Plaintiff's Ex. 10). In response, Swert indicated that there had been no further meetings on the subject. (Plaintiff's Ex. 11). In July 1981, Coulter brought Local 74's Columbus yard equity claim to the attention of UTU Vice President J. R. Wells. (Defendant's Ex. 64, p.2). Wells had been handling road equity claims by Local 74, but his tentative recommendations on those claims (Plaintiff's Ex. 15) were never adopted by UTU.

Finally, in May 1982, plaintiff's counsel wrote to UTU President Hardin in behalf of Local 74. (Plaintiff's Ex. 16). Although Columbus yard equity is not specifically mentioned, the evidence throughout trial, along with the

exhibits referred to above, indicate that such was a continuing concern. President Hardin responded, in his June 3, 1982 letter, by stating that he had no authority in these matters. (Plaintiff's Ex. 17). He referred Local 74 back to the same General Committee whose Chairman (L. W. Swert) had previously reviewed the yard equity claim.

In the Court's opinion, this was the point at which plaintiff knew or should have known that Columbus yard equity for Local 74 would not be pursued further nor resolved more definitely by Swert. Because plaintiff filed its complaint within two months of this final exchange of letters, defendant's defense based on a statute of limitations is without merit. By responding to plaintiff's inquiries with a willingness to examine facts, figures or further proof, UTU clearly kept plaintiff's claim alive over the years.[5] Accordingly, plaintiff's claim is not barred by the six month statute of limitations.

EXHAUSTION OF INTERNAL UNION REMEDIES

Defendant argues next that plaintiff's claim to yard equity at the Buckeye yard is barred for failure to exhaust internal union remedies. UTU's Constitution at Article 75(I)(a-f) provides with regard to appeals:

> (a) An officer or member of a local may appeal from an action or decision of a local to the Board of Appeals, except as provided in

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[5] This case is unlike *Ratkosky v. United Transportation Union*, 843 F.2d 869, 874 (6th Cir. 1988), where UTU informed the local in writing that it would not renegotiate the seniority provisions, thus definitely triggering the six month statute of limitations.

Paragraph (c) below. Such appeal shall be filed with the General Secretary and Treasurer within ninety (90) days from the date the action or decision occurred.

(b) A subordinate body may appeal an action or decision against it to the Board of Appeals, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date the action or decision occurred.

(c) An officer or member of a local may appeal from an action or decision of a Local Committee of Adjustment to the appropriate General Chairman, provided such appeal is filed with the General Chairman within ninety (90) days from the date the action or decision occurred.

(d) A local member or a local may appeal from an action or decision of a General Chairman to the General Committee of Adjustment, provided the appeal is filed within ninety (90) days from the date the action or decision occurred. Appeals to the General Committee of Adjustment must be filed with the Secretary of the General Committee and shall be acted upon not later than the next session of the General Committee of Adjustment.

(e) An appeal pending before a General Committee of Adjustment which has not been acted upon within ninety (90) days shall be referred by the Secretary of the General Committee of Adjustment to the Board of Appeals for a decision, provided the appellant makes a request to do so to the Secretary of the General Committee at least thirty (30) days prior to the date the Board of Appeals is scheduled to convene.

> (f) An appeals from the decision of the General Committee of Adjustment may be made to the Board of Appeals provided the appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date of the decision of the General Committee of Adjustment.

(Defendant's Ex. 2b, 2c).

In addition, Article 90 of UTU's Constitution details particular procedures for resolving disputes when traffic is permanently diverted from one yard seniority district to another:

> Disputes arising under this Article which cannot be resolved by the General Committee or General Committees shall be referred to the International President. The International President shall promptly assign an officer to assist the General Committee or General Committees involved in resolving the dispute. Failing to resolve the dispute the officer shall make a complete report and recommendation to the International President who, in turn, shall decide the dispute.
>
> Any local or member of a local affected by action or decision of a Chairman, Sub General Committee or General Committee, or by the decision of the International President with respect to this Article may appeal such action or decision to the Board of Appeals, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date of the action or decision. . . .

(Defendant's Ex. 2b, 2c at Article 90).

As set forth above, UTU's internal procedures plainly provide a broad range of appeal options. Any member or

local has the opportunity to appeal any action or decision made by an officer or group within the union, as long as the appeal is filed within ninety days.

The law is well established that the courts will defer to internal union appeal and review procedures in regard to matters arising under union internal law. Where, as here, the union constitution provides for internal appeal and review procedures, a complaining member (or, as here, a local) should exhaust or attempt to exhaust those internal appeal remedies before coming to court, unless the appeal procedures would be futile or the review board is hostile. *See Clayton v. Int'l Union, United Automobile, Aerospace, & Agricultural Implement Workers of America*, 451 U.S. 679 (1981).

This Court clearly has discretion to decide whether to require exhaustion of internal union procedures. *Id.* at 689. At least three factors, however, must be considered:

> first, whether union officials are so hostile to [the local] that [it] could not hope to obtain a fair hearing on [its] claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the . . . grievance or to award . . . the full relief [sought] . . . ; and third, whether exhaustion of internal procedures would unreasonably delay the [local's] opportunity to obtain a judicial hearing on the merits of [its] claim. If any of these factors are found to exist, the court may properly excuse the [local's] failure to exhaust.

Id.

None of the foregoing factors exist in the instant case. Having observed the Bennett decision filter smoothly through UTU's internal appeal process, with favorable

results to former EL employees, plaintiff had no reason to think the same avenue would be unfair, futile or inordinately time consuming in this instance, nor that the Board of Appeals would be hostile.

Nonetheless, plaintiff submits that appeal procedures were never triggered because UTU did not actually act on or reject the yard equity claim. Plaintiff insists that UTU simply put off and evaded implementing plaintiff's claim to yard equity at Columbus until Local 74 had no alternative but legal action.

Viewed realistically, plaintiff could have filed an appeal at almost any time objecting to the General Committee's failure to formally deal with yard equity. It is undisputed that no such appeals were even attempted. (Tr. at 234-237, 433-434). Although numerous local representatives were involved over the years, causing understandable confusion and a lack of continuity, plaintiff's inattention to established methods for resolution was unreasonable. Defendant's argument is therefore found well taken. The Court, after thorough consideration of the evidence and Local 74's circumstances, finds that plaintiff's claims are barred for failure to exhaust internal union remedies.

DUTY OF FAIR REPRESENTATION

Even assuming, *arguendo*, that plaintiff's action is viable despite the failure to exhaust internal union appeal procedures, plaintiff has not established that UTU breached its duty of fair representation by failing to obtain the yard equity allegedly due.

It is well established that a union has a duty to fairly represent all members of its bargaining unit. *Ruzica v. General Motors, Corp.*, 523 F.2d 306, 309-310 (6th Cir. 1975) ("A union must conform its behavior to each of . . . three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct.") (quoting *Griffin v. Int'l Union of United Automobile Workers*, 469 F.2d 181, 183 (4th Cir. 1974).

A breach of that duty, amounting to a claim for unfair representation, requires a showing of bad faith, discrimination or arbitrary conduct on the part of the union. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *McKinney v. Int'l Ass'n of Machinists*, 624 F.2d 745, 748 (6th Cir. 1980) ("In order to charge a union with breach of the duty of fair representation, the plaintiff must prove arbitrary, discriminatory, or bad faith action or some other animus related conduct on the part of the Union.") *Dill v. Greyhound Corp.*, 435 F.2d 231, 238 (6th Cir. 1970); *cert. denied*, 402 U.S. 952 (1971); *Balowksi v. UAW*, 372 F.2d 829, 834 (6th Cir. 1967).

In the case *sub judice*, plaintiff's unfair representation claims fall into two categories. Plaintiff alleges that UTU, prompted by favoritism toward former PC employees, acted in an arbitrary, discriminatory or bad faith manner by: (1) steadfastly refusing to honor plaintiff's prior rights share in yard work transferred from Marion, Ohio; or (2) failing to correct the inevitable injustice of the prior rights seniority system to former EL employees by, for

example, switching to a straight date-of-hire dove-tailed roster for yard employees.

UTU responds that failing to allocate or obtain some yard equity for plaintiff was neither arbitrary, discriminatory nor in bad faith. For several reasons, this Court agrees.

First, yard equity claims are typically made only where the railroad designates a consolidation of yards (Tr. at 332-334, 652-661), and in this case, several witnesses indicated that Conrail never told UTU that it was consolidating Marion with Columbus or Toledo. Specifically, plaintiff's former local chairman John Chapman answered as follows:

> Q. You agree the railroad never told anyone they were going to consolidate Marion with Columbus, isn't that right?
>
> A. Yes.

(Tr. at 127). Former Assistant Vice President of Labor Relations for Conrail, Joseph Palmer, also indicated as much:

> Q. You ever notify the union . . . that you were consolidating Marion yard work with any yard outside of Marion?
>
> A. Outside of Marion, no.

(Tr. at 331). (*See also* Tr. at 325-326, 330-331).

Second, the reason equity is not given unless specified yards are actually consolidated is because carrier commingling of freight traffic and continual changing of traffic patterns makes diversions of yard work impossible to trace. As explained by Mr. Palmer:

Q. Now, in your experience on the Penn Central and on Conrail in labor relations is it not a fact that the carrier is constantly in the process of moving switching work from one facility to another?

A. Oh, yes.

Q. And that the switching work at all the yards fluctuates upwards, downwards constantly throughout the year?

A. That is correct.

Q. And part of the reason for that is that the carrier re-routes traffic from time to time for various reasons of economic efficiency and strategy of improving service?

A. That is correct.

Q. Now, is it the practice within this union, as you know it, in dealing with labor relations, for any of the yard groups to claim equity when their yard loses work because the carrier may have moved it to some other facility to switch it for better service?

A. My experience is that has never happened.

Q. Do you have an opinion, Mr. Palmer, as to why it has never happened?

A. Yes, I think it is probably two-fold: one, that it will be almost impossible to identify just what created a downward trend in one location and an upward in another; and secondly, the reason, I think, that the operating department is forever making changes, and you probably couldn't get the information and get your equity allocation in place before the whole thing changed again.

Probably that is the reason there have never been any overtures made for people to attempt to follow work when you, for instance, say you

are going to take a classification grouping out of Elkhart and do it in Selkirk, my experience is it just has never happened that the organization requested there.

Q. I take it there were many occasions when switching was moved from one location to another?

A. It happens about just everyday.

Q. And the various cases that Mr. Murray asked you about with his diagram here, about A and B yards and thirty-six jobs and seventy-two jobs, your testimony with respect to the assumed, as I think he went into this question, exactly the opposite situation that you described – and in his question he was assuming that one knew where that work went, from yard A to yard B?

A. That was the assumption I understood, that you could identify the work that went from yard A to yard B.

Q. Your experience is with this union on Penn Central and Conrail that except where it can be clearly identified there has never been any attempt to assert a claim to equity outside of a consolidated yard; is that correct?

A. That is correct.

Q. Inasmuch as your own operating people who made the judgments about what they were consolidating, where they were consolidating, what they were consolidating with the traffic, inasmuch as your own operating people who made all those decisions about consolidations, or lack of consolidations, inasmuch they never told you they were consolidating the Columbus and Marion yard, would it not be a reasonable assumption to conclude that there was not any

consolidation of Marion yard work with the Buckeye yard?

A. Yes, that would be a reasonable assumption.

(Tr. at 332-334).

Thus, competent testimony reveals that the Marion yard was not consolidated with Columbus. More importantly, numerous witnesses including Palmer indicated that it is not feasible to actually identify where lost yard jobs end up. (Tr. at 261-262, 516-517, 659-660). Clearly, these factors make plaintiff's claim to yard equity increasingly tenuous.

Third, the evidence at trial belies plaintiff's claim that yard work at Columbus increased after the formation of Conrail. Plaintiff relies largely on a daily list of extra engines added to regular jobs at the Buckeye yard presumably in April, 1976. (Plaintiff's Ex. 30). A review of the document indicates, however, that the extra engines averaged 2 1/2 per day over *both* months; clearly showing no marked increase. (Tr. at 135-139). If the majority of Marion yard work was classified in Columbus after April 1, 1976, the gain should certainly have been significant. Also, there was no upgrading (i.e. expansion or increase) in the physical operations at the Buckeye Yard at that time, (Tr. at 321, 662), another factor weighing against Columbus work increasing in proportion to Marion's decrease.

Additionally, as evidence of the transfer of yard switching and classification work to Columbus, plaintiff identified two trains (the MO-3 and MO-4) put on by Conrail after its start-up to run between Marion and Columbus via Ridgeway. (Tr. at 148-150). These trains

brought cars to and returned cars from Marion industries, including General Motors (the "Harding" yard). (Tr. at 54-55, 148, 808-809). The switching of these cars, however, remained with Marion yard crews (Tr. at 809) and was not part of the classification of east-west traffic lost when the Marion to Chicago line was abandoned. (Tr. at 203-204).

In summary, all of the foregoing facts bolster the opinions of C.R. Bethge (Tr. at 423-424, 434-436) and L.W. Swert (Plaintiff's Ex. 9), who on separate occasions, did not pursue plaintiff's yard equity claim because they thought it had no merit. Admittedly, plaintiff's yard equity claim was handled in an inefficient manner. Defendant's conduct, however, does not rise to the level of bad faith, discrimination or arbitrariness. Plaintiff has failed to supply defendant (and now this Court) with proof of entitlement to yard equity either in Columbus, Toledo, or elsewhere. Utilizing available information, defendant acted reasonably when it did not obtain yard equity for plaintiff. Accordingly, it is the judgment of this Court that UTU did not breach its duty of fair representation in this regard.

The more telling question is whether UTU breached its duties by failing to correct the injustice of the prior rights system to a small group of its membership (former EL employees), whose major source of yard equity (classification work from the east-west Marion to Chicago line) was eliminated prior to Conrail's acquisitions. The Sixth Circuit in *Ratkosky* discusses just such a problem where discrimination against a minority faction is alleged:

> Unions are given broad discretion by the courts in their collective bargaining decisions. In establishing seniority systems, there are a variety of

legitimate options, and the courts are careful not to substitute their judgments for those of the authorized labor organization. Moreover, the fact that a seniority system in a collective bargaining agreement favors one group more than another does not in itself constitute a breach of the union's duty. Bad faith or intentional discrimination by the union must be shown. Thus, the Supreme Court has recognized:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in service the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities injuries received in course of service, and time or labor devoted to related public service whether civil or military, voluntary or involuntary.

> *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-39, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953) (quoted in *Shamblin v. General Motors Corp.*, 743 F.2d 436, 438 (6th Cir. 1984)).
>
> Relying on the foregoing language from *Huffman*, the Ninth Circuit has stated:
>
> > An essential element, then, necessary to raise a limitation upon a union's discretion in bargaining with respect to seniority rights is a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership.
> >
> > *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182, 185 (9th Cir.), *cert. denied*, 371 U.S. 920, 83 S.Ct. 288, 9 L.Ed.2d 229 (1962).

843 F.2d at 877.

The Sixth Circuit went on in *Ratkosky* to summarize an Eighth Circuit decision, *Augspurger v. Brotherhood of Locomotive Engineers*, 519 F.2d 853, 859 (8th Cir. 1975), wherein the railroad union's adoption of an equity seniority system rather than a straight date-of-hire dovetailed roster was held *not* to be a breach of the fair representation duty.

> In *Augspurger*, a local union and seventeen individual members filed suit against the international union alleging a breach of the duty of fair representation based on the union's negotiation of a consolidated seniority roster following the pre-Conrail merger of several railway carriers. The plaintiffs alleged that their seniority rights had been diminished because the union had adopted a "work-equity" seniority system rather than a dove-tailed system on a straight date-of-hire basis. The district court dismissed the complaint on jurisdictional ground deferring

to the primary jurisdiction of the Interstate Commerce Commission (ICC) which had supervised and approved the merger.

On appeal, the Eighth Circuit found that the district court erred in refusing to exercise its jurisdiction to hear the plaintiffs' claim even though the disputed conduct arose out of an agency regulated merger. The appellate court ruled that a claim for breach of the duty of fair representation is an exception to the primary jurisdiction doctrine which is ordinarily applied in cases arising out of supervised mergers. *Augspurger*, 510 F.2d at 857-58. Nevertheless, the Eighth Circuit upheld the district court's dismissal of plaintiffs' claim on other grounds finding that plaintiffs had failed to state a claim for breach of the duty of fair representation. Citing *Huffman* and *Hardcastle*, the Eighth Circuit held that seniority rosters need not be limited to strict date-of-hire systems, and that the adoption of an alternative system which worked to the disadvantage of the plaintiffs was not sufficient to establish the type of bad faith or discriminatory conduct necessary to show that the union had breached its duty of fair representation. *Augspurger*, 510 F.2d at 859.

Ratkosky, 843 F.2d at 877-8.

Accordingly, to prevail in this case plaintiff must establish UTU's intent to hostilely discriminate against former EL yard employees. As in *Augspurger*, merely demonstrating that the prior rights seniority system impacted detrimentally on plaintiff is not enough. *But see Zapp v. United Transportation Union*, 727 F.2d 617, 627 (7th Cir. 1984). (Plaintiff adequately alleges hostile discrimination merely by showing that the union decided to negotiate a particular type of seniority having a detrimental impact on a small faction of employees). Rather, plaintiff must

show that UTU's failure to switch to a straight date-of-hire dove-tailed roster was intentionally discriminatory. There is no evidence of that here.

When the 1975 Agreement was made, a date-of-hire system was voted down. (Defendant's Ex. 58). When Local 74 pursued such a system in 1980, the inference from the testimony of various witnesses was that the Conrail North General Committee preferred adherence to the prior rights system to the extent possible, in accordance with Article 90 of UTU's Constitution.

In 1981, J.R. Wells suggested merged seniority rosters as the only possible solution for Local 74's road equity disputes. (Plaintiff's Ex. 15). However, he listed numerous problems that would result, specifically:

If it is determined that seniority rosters are to govern, we will then be faced with other problems such as but not limited to the following:

1. Previous established equities.
2. Erie Lackawanna men were not dovetailed on rosters.
3. Erie Lackawanna men now enjoy equity assignments in seniority districts where they formerly had no trackage.
4. Some groups now have equity in seniority districts other than the districts where they hold seniority.
5. Some men (such as men from the former Detroit Terminal railroad) have been placed at the bottom of Conrail's Roster and can work only as a result of holding equity assignments even though they have many years of continuous Railroad service.

(*Id.*) Thus, to adopt a straight date-of-hire system and eliminate prior rights could be fraught with difficulties.

In this light, UTU's failure to make this switch cannot be viewed as arbitrary nor intentionally hostile.

Finally, plaintiff's primary focus is on the predominance of former PC employes within UTU's structure and the lack of EL representation beyond the locals. It is undisputed that the PC was the largest of the railroads that make up Conrail and had the most employees of any of the merged railroads. However, although the chairman of Conrail North, L.W. Swert, was a former PC employee, the committee itself had a minority of former PC local chairman. (Defendant's Ex. 69B). And in fact, the equity request was initially handled/rejected in 1976-1977 by Vice Chairman C.R. Bethge, a former New York EL employee. Thus, plaintiff's generalized assertions of majority/minority favoritism have little substance.

For these reasons, defendant is entitled to judgment on all of plaintiff's claim.

IT IS SO ORDERED

/s/ Nicholas J. Walinski
SENIOR U.S. DISTRICT
JUDGE

Toledo, Ohio.
July 29, 1988.